UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
BEFORE THE REGIONAL ADMINISTRATOR
REGION 10

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| IN THE MATTER OF: | ) | Docket No. 10-97-0123-OPA |
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| City of Nondalton, | ) | Proceeding to Assess |
| Nondalton Water Treatment | ) | Class I Administrative |
| Plant | ) | Penalty Under Clean Water |
| | ) | Act Section 311, |
| RESPONDENT | ) | 33 U.S.C. §1321 |
| | ) | |
| | ) | |

ORDER GRANTING MOTION FOR ACCELERATED DECISION AS TO LIABILITY

This is a proceeding for the assessment of a Class I administrative penalty under Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i). The proceeding is governed by the Environmental Protection Agency's procedural rules at 40 C.F.R. Part 22, the Consolidated Rules of Practice Governing the Administrative Assessment of Civil Penalties ("the Consolidated Rules"), 64 Fed. Reg. 40138 (July 23, 1999).[1]

STATUTORY AND REGULATORY BACKGROUND

Section 311(j)(1) of the Clean Water Act, 33 U.S.C. §1321(j)(1), provides for the issuance of regulations "establishing procedures, methods, and equipment and other requirements for equipment to prevent discharges of oil and

[1] The proceeding was originally governed by proposed procedural rules in 40 C.F.R. Part 28, 56 Fed. Reg. 29996 (July 1, 1991).

hazardous substances from vessels and from onshore and offshore facilities, and to contain such discharges . . . ."

The implementing regulations, found at 40 C.F.R. Part 112, apply to

> owners or operators of non-transportation-related onshore and offshore facilities engaged in drilling, producing, gathering, storing, processing, refining, transferring, distributing or consuming oil and oil products, and which, due to their location, could reasonably be expected to discharge oil in harmful quantities . . . into or upon the navigable waters of the United States or adjoining shorelines.

40 C.F.R. Section 112.1(b).

Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. Section 112.7 not later than six months after the facility began operations, or by July 10, 1974, whichever is later, and must implement that SPCC plan not later than one year after the facility began operations, or by January 10, 1975, whichever is later.

Section 311(b)(6)(A)(ii) of the Clean Water Act, 33 U.S.C. §1321(b)(6)(A)(ii), provides for Class I or Class II administrative penalties against any owner, operator, or person in charge of any vessel, onshore facility, or offshore facility who fails or refuses to comply with any regulation issued under Section 311(j) to which that owner, operator, or person in charge

is subject.[2] Section 311(b)(6)(B)(i) of the Clean Water Act, 33 U.S.C. § 1321(b)(6)(B)(i), provides that, before assessing a Class I civil penalty, the Administrator must give the person to be assessed such penalty written notice of the proposed penalty and the opportunity to request a hearing on the proposed penalty.

FACTUAL AND PROCEDURAL BACKGROUND

The Unit Manager of Emergency Response and Site Cleanup Unit No. 1 of the Office of Environmental Cleanup of Region 10 of the United States Environmental Protection Agency (Complainant) initiated this action on September 30, 1997, by issuing an administrative complaint to City of Nondalton, Nondalton Water Treatment Plant, Nondalton, Alaska, (Respondent) alleging that Respondent violated the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 and the Clean Water Act. The complaint provided notice of a proposed penalty for one violation in an amount up to $10,000.

By memorandum dated October 2, 1997, the undersigned was designated as Presiding Officer in this matter.

The Respondent failed to answer the Complaint. The Complainant filed a Motion for Default Judgment on May 7, 1998. On June 3, 1998 the Presiding Officer denied the motion for default and issued an Order Granting Leave to Amend the

[2]The Oil Pollution Act of 1990 amended Section 311 of the Clean Water Act to increase penalties for oil spills and for violations of Section 311(j).

Administrative Complaint.

An Amended Administrative Complaint was issued July 17, 1998, alleging that the City of Nondalton violated the Oil Pollution Prevention Regulations at 40 C.F.R. Part 112 by failing to prepare an SPCC plan for its water treatment plant. The Mayor of the City of Nondalton, apparently acting pro se, answered the Amended Administrative Complaint by letters dated October 3, 1997, March 6, 1998, and August 14, 1998, in which he disputed allegations in Section 18 of the Complaint which stated that the fuel storage capacity at the water treatment plant exceeds 40,000 gallons,[3] and requested a hearing. No other allegations were disputed. The Mayor stated that the City would prepare an SPCC plan for the facility, but the parties were unable to reach agreement on a number of issues, and the case was scheduled for hearing on September 28, 1999.

On July 26, 1999, the Complainant requested that the hearing schedule be changed so the Complainant could file a Motion for Accelerated Decision, which it anticipated filing by September 30, 1999. The Complainant's request was granted by the Presiding Officer on August 20, 1999. The Complainant filed its Motion for

[3] Section 18 of the Amended Administrative Complaint contains a penalty justification analysis which appears to erroneously refer to the facts of a companion case involving the bulk fuel storage facility at the Nondalton airport. Compare Section 19 in the Amended Administrative Complaint in case No. 10-97-0122-OPA.

Accelerated Decision as to Liability on August 24, 2000. In light of the fact that the Complainant's motion was filed later than anticipated, the Respondent was allowed 21 days from October 18, 2000, to file a response to the motion. The Respondent has failed to file any response to the Motion for Accelerated Decision as to Liability.[4]

STANDARDS FOR SUMMARY DETERMINATION

Section 22.20(a) of the Consolidated Rules provides:

> The Presiding Officer may at any time render an accelerated decision in favor of a party as to any or all parts of the proceeding, without further hearing or upon such limited additional evidence, such as affidavits, as he may require, if no genuine issue of material fact exists and a party is entitled to judgment as a matter of law . . . .

Summary judgment law under Federal Rule of Civil Procedure 56 is applicable to accelerated decisions under the Consolidated Rules of Practice. Puerto Rico Aqueduct and Sewer Authority v. EPA, 35 F.3d 600 (1st Cir. 1994), cert. denied, 513 U.S. 1148 (1995); CWM Chemical Services, Inc., 6 E.A.D. 1 (EAB 1995). The party moving for summary judgment has an initial burden to show the absence of any genuine issues of material fact. Upon such showing, the opponent of the motion "may not rest upon the mere allegations or denials of [its] pleading, but [its] response ... must set forth specific facts showing that there is a genuine

[4] Under Section 22.16(b) of the Consolidated Rules, any party who fails to respond within the designated period waives any objection to the granting of the motion.

issue for trial." Fed. R. Civ. Proc. 56(e). The party opposing the motion must demonstrate that the issue is "genuine" by referencing probative evidence in the record, or by producing such evidence. Clarksburg Casket Company, EPCRA Appeal No. 98-8, slip op. at 9 (EAB, July 16, 1999); Green Thumb Nursery, 6 E.A.D. 782, 793 (EAB 1997). A factual issue is "material where, under the governing law, it might affect the outcome of the proceeding," and is "genuine if the evidence is such that a reasonable finder of fact could return a verdict in either party's favor." Clarksburg Casket, slip op. at 9. The record must be viewed in a light most favorable to the party opposing the motion, indulging all reasonable inferences in that party's favor. Griggs-Ryan v. Smith, 904 F.2d 112, 115 (1st Cir. 1990).

DISCUSSION

To state a cause of action against the Respondent under Section 311 of the Clean Water Act, 33 U.S.C. § 1321, and 40 C.F.R. Section 112.3, Complainant must allege that (1) the Respondent is the owner or operator (2) of an onshore facility (3) that could reasonably be expected to discharge oil in harmful quantities (4) into or upon the navigable waters of the United States or adjoining shorelines, and that (5) the Respondent has failed to prepare a SPCC plan within six months after the facility began operation or by July 10, 1973, whichever is

later.[5]

(1) The term "owner or operator" as it applies to an onshore facility is defined in Section 311(a)(6) of the Clean Water Act, 33 U.S.C. § 1321(a)(6), and 40 C.F.R. Section 112.2 as "any person owning or operating" the facility. "Person" is defined in turn in Section 311(a)(7) of the Clean Water Act and 40 C.F.R. Section 112.2 to include "an individual, firm, corporation, association, and a partnership." Although it is not obvious from these definitions, a municipality organized under State law is included in the definition of "person" under Section 311 of the Clean Water Act. United States v. City of New York, 481 F. Supp. 4, (S.D.N.Y. March 7, 1979) aff'd U.S. v. City of New York, 614 F.2d. 1292 (2d Cir. November 26, 1979), cert. den. City of New York v. U.S., 446 U.S. 936, 100 S.Ct. 2154 (May 12, 1980). Consequently, Respondent City of Nondalton is a "person" under Section 311 of the Clean Water Act. The Respondent does not dispute that it is the "owner or operator" of the water treatment plant.

(2) The Respondent does not dispute that the water treatment plant meets the definition of a non-transportation-related onshore facility. See Section 311(a) of the Clean Water Act, 40 C.F.R. Section 112.2, and Appendix A Section II to 40 C.F.R. Part

[5]Other violations that could be alleged under Section 311 of the Clean Water Act and 40 C.F.R. Section 112 are omitted, in the interests of simplicity of exposition.

112 for the relevant definitions.

(3) Due to the number and size of the above-ground fuel storage tanks at the facility, which have a total capacity of over 2000 gallons, the facility could reasonably be expected to discharge oil in harmful quantities. The Respondent admits that the facility has one 2000 gallon storage tank and one 500 gallon tank. Complainant's Exh. 6A (Letter to EPA from Thomas J. Greene, Mayor, dated October 23, 1997).

(4) Due to its location in close proximity to Six Mile Lake,[6] oil from the facility would be discharged into or upon the navigable waters of the United States or adjoining shorelines. The Respondent has not disputed this.

(5) The Respondent does not dispute that it failed to prepare an SPCC plan within six months after the facility began operation, or by July 10, 1973, whichever is later. It is unclear from the record whether the Respondent is arguing that it should not have to prepare an SPCC Plan because the 2000 gallon tank was not in use at the time of the 1996 inspection.[7]

Based on the description of the City's fuel storage tanks and distribution system in the 1996 and 1999 EPA Inspection

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[6] The water treatment plant is approximately 150 feet uphill from Six Mile Lake. Complainant's Exhibits 4 and 5.

[7] See letter to EPA from Thomas J. Greene, Mayor dated March 6, 1998, Complainant's Exh. 6B. The Respondent appears to be arguing only that the penalty should be mitigated because the tank was not in active use.

Reports, Complainant's Exhibits 4, 5, 7, and 9, heating oil is delivered to the City by airplane and then trucked to the 2000 gallon tank for winter storage, from which it is used to refill the 500 gallon tank at the treatment plant building via an underground pipe. At the time of both the 1996 and 1999 EPA inspections, the 2000 gallon tank was disconnected from the pipe supplying the 500 gallon tank and was apparently not being used to store fuel. See EPA inspection reports, Complainant's Exh. 4, 5, and 7. According to the Respondent, the 2000 gallon tank had not been in use since 1992, but could be reconnected to the supply pipe "in a few hours". See EPA inspection report, Complainant's Exh. 9.

The Complainant argues correctly that the City's temporary lack of use of the facility's 2000 gallon storage tank does not relieve the City from complying with the SPCC requirements, including the preparation of an SPCC plan. Complainant's Memorandum in Support of Motion for Accelerated Decision as to Liability, p. 7.

It is clear from photographs taken during the 1999 EPA inspection that the 2000 gallon storage tank could be easily reconnected to the distribution pipe supplying the 500 gallon tank. Complainant's Exh. 7, photograph No. 009. Consequently, the 2000 gallon tank was capable of being operated as of June 18, 1999, and presumably also as of July 31, 1996, the time of the

earlier EPA inspection. The record contains no evidence to show that all of the facility's tanks were permanently inoperable as of the time of the 1996 EPA inspection, and the Respondent has not come forward with any such evidence. Therefore, an SPCC plan was required for the facility, regardless of whether any of the tanks had fuel in them or whether the 2000 gallon tank was temporarily disconnected from the distribution pipe to the 500 gallon tank. See Pepperell Associates, CWA Appeal Nos. 99-1, 99-2, slip op. at 21-26 (EAB, May 10, 2000), citing Ashland Oil Co., 4 E.A.D. 235, 249 (EAB 1992) which holds that commencement of a violation for failing to prepare and submit an amended SPCC plan began when a tank was first installed rather than when the tank was connected to piping or actually filled.

The opponent of a motion for accelerated decision must set forth facts showing that there is a genuine issue of material fact for hearing; it is not sufficient for the opponent to simply disagree with or deny the allegations of the Complaint. Clarksburg Casket Co., EPCRA Appeal No. 98-8 slip op. at 9 (EAB, July 16, 1999). In light of the evidence in the record, and the fact that the Respondent has made no showing to the contrary, I find that as of July 31, 1996, the facility was required to have an SPCC plan. The Complainant's Motion for Accelerated Decision as to Liability should therefore be granted.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based on the pleadings, exhibits, and other documents filed in this proceeding, I make the following Findings of Fact and Conclusions of Law:

(1) Respondent is a municipal corporation organized under the laws of Alaska. Respondent is a person within the meaning of Section 502(5) of the Clean Water Act and 40 C.F.R. Section 112.2.

(2) Respondent is an owner or operator within the meaning of Section 311(a)(6) of the Clean Water Act, 33 U.S.C. §1321(a)(6), and 40 C.F.R. §112.2 of the Nondalton water treatment plant, a facility used for gathering, storing, processing, transferring, or distributing oil or oil products, located at Nondalton, Alaska ("the facility").

(3) The facility is an "onshore facility," as defined in Section 311(a)(10) of the Clean Water Act and 40 C.F.R. Section 112.2. Due to its location, the facility could reasonably be expected to discharge oil in harmful quantities to the navigable waters of the U.S. or adjoining shorelines, as described in 40 C.F.R. Section 110.3.

(4) The facility has an above-ground storage capacity greater than 1,320 gallons of oil or oil products and has at least one container whose capacity exceeds 660 gallons. Specifically, the facility has at least two above-ground storage tanks, one with a capacity of 2,000 gallons and the other 500

gallons, for a total above-ground storage capacity of at least 2500 gallons.

(5) The facility is a non-transportation-related facility under the definition referenced at 40 C.F.R. Section 112.2 and set forth in 40 C.F.R. Part 112, Appendix A § II and 36 Fed. Reg. 24,080 (December 18, 1971).

(6) Based on the above, and under Section 311(j) of the Clean Water Act and its implementing regulations, Respondent is subject to 40 C.F.R. Part 112 as an owner or operator of the facility.

(7) Under 40 C.F.R. Section 112.3, the owner or operator of an onshore facility that is subject to 40 C.F.R. Part 112 must prepare a Spill Prevention Control and Countermeasure ("SPCC") plan in accordance with 40 C.F.R. Section 112.7 not later than six months after the facility began operations, or by July 10, 1973, whichever is later, and must implement that SPCC plan not later than one year after the facility began operations, or by January 10, 1974, whichever is later.

(8) The City of Nondalton began operating the facility more than six months prior to July 17, 1998, the date the Complainant issued the Amended Administrative Complaint in this matter.

(9) On July 31, 1996, and June 18, 1999, EPA representatives inspected the facility to assess its compliance with federal oil spill prevention requirements.

(10) As of July 31, 1996, the 2000 gallon fuel storage tank at the facility was capable of being operational within a few hours by being reconnected to the pipe supplying the 500 gallon fuel tank; an SPCC plan was therefore required for the facility.

(11) Respondent has failed to prepare an SPCC plan for the facility, in violation of 40 C.F.R. Section 112.3.

(12) Pursuant to Section 311(b)(6)(B)(i) of the Clean Water Act, the Respondent is liable for a civil penalty of up to $10,000 for one violation, the failure to prepare an SPCC plan for the facility.

CONCLUSION

On the basis of the findings and reasons set forth above, I find that no genuine issue of material fact exists as to Respondent's liability, and the Complainant is entitled to judgment as a matter of law. The Complainant's Motion for Accelerated Decision as to Liability is hereby GRANTED. Further proceedings to determine the appropriate penalty will be scheduled by subsequent order.

/S/
Steven W. Anderson
Regional Judicial Officer

Date: March 1, 2001